

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in July 2015

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Unacceptable Behavior; Sexual Harassment; Profanity; Hostile Work Environment; Inappropriate Sexual Comments; Retaliation; Mitigation

CASE STYLE: Hose v. West Virginia University
DOCKET NO. 2015-0648-WVU (7/28/2015)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant.

SUMMARY: Grievant's employment was terminated by Respondent for sexual harassment and retaliation. Grievant's juvenile antics toward both male and female co-workers were unwelcome and sexual in nature, and caused his co-workers to be uncomfortable in his presence and change their own work patterns to avoid him. Respondent proved the charges against Grievant.

KEYWORDS: Tenure Review; Appointment Letter; Annual Review; External Funding; Arbitrary and Capricious; Disregard of Facts; Mistake of Fact

CASE STYLE: Knox v. West Virginia University
DOCKET NO. 2014-1630-WVU (7/1/2015)

PRIMARY ISSUES: Whether Respondent's decision to deny Grievant tenure was arbitrary and capricious.

SUMMARY: Grievant was hired by Respondent as a full Professor in the Department of Community Medicine of the School of Medicine in the scientist tenure-track. Although Grievant's service, teaching and publication record were historically excellent, her application for tenure was denied because she had not been able to obtain any grant funding. The Chancellor of Health Sciences, the Dean of the School of Public Health, and the Interim Chair of the Department of Epidemiology conclusions that tenure should be denied were in disregard of the facts and circumstances of the case, and in complete disregard of the change in the funding climate, and based on a mistake of facts. As such, the decision to deny tenure was arbitrary and capricious.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Termination; Immorality; Incompetency; Cruelty; Insubordination; Willful Neglect of Duty; Improvement Plan; Unsatisfactory Performance; Yelling at Students; Intimidation of Students; Silence on Bus; Writing While Driving; Failure to Observe Students When Boarding
<u>CASE STYLE:</u>	<u>Risk v. Hancock County Board of Education</u> DOCKET NO. 2015-0623-HanED (7/13/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent had good cause to terminate Grievant's employment.
<u>SUMMARY:</u>	Grievant was terminated from his employment as a bus operator for immorality, incompetency, cruelty, insubordination, intemperance, and willful neglect of duty. Respondent demonstrated that Grievant controlled the young children riding his bus by speaking to them in a raised, harsh voice and intimidating them, and that he imposed on them the unreasonable requirement that they sit in silence or not speak above a whisper at all times, creating an unpleasant environment for the children, if not one of fear. Grievant had previously been placed on an improvement plan for this very same conduct, and had been counseled on better, more productive ways to maintain discipline on the bus. Respondent expected Grievant to treat the students on his bus better, and had made this clear to him on many occasions. Grievant, however, chose not to amend his behavior. Respondent also demonstrated that Grievant showed a lack of regard for the safety of the students on the bus, with the most egregious instances being writing on paper on the steering wheel while the bus was moving and there were children on the bus and driving with no hands on the steering wheel. Finally, Respondent demonstrated that Grievant showed a lack of concern for the safety of the children when they were boarding the bus, failing to monitor them and count them as they boarded, as was his job.

KEYWORDS: Probationary Contract; Leave of Absence; Moot; Remedy

CASE STYLE: Richmond v. Summers County Board of Education

DOCKET NO. 2015-0655-SumED (7/26/2015)

PRIMARY ISSUES: Whether the grievance is moot.

SUMMARY: During the 2014-2015 employment term, Grievant was unable to work and found it necessary to seek a leave of absence from the Board. Grievant's request was denied because the Board's policy only allowed a leave of absence for employees with continuing contracts. Grievant filed the grievance alleging he had been improperly denied a continuing contract and therefore a leave of absence, because he feared the Board would dismiss him since he was not able to work. However, the Board did not dismiss Grievant and he was able to be off work without suffering any consequence. Consequently, the triggering event of losing a substantive right which Grievant was relying upon never occurred. Additionally, the Board did not renew Grievant's contract at the end of the year, and Mr. Richmond filed a grievance dated May 15, 2015, contesting that action based upon his belief that he has a continuing contract. Grievant cannot get the substantive relief from this grievance that he seeks, and the continuing contract issue he seeks to have resolved, is raised in his subsequent grievance. Accordingly, this grievance is moot and is DISMISSED.

KEYWORDS: Contract Terms; Posting; Notice Requirements; 240-Day Position; 261-Day Position; Terms of Employment; Withdrawal of Application; Timeliness; Standing; Change in Number of Days

CASE STYLE: Walker v. Pocahontas County Board of Education and Justin Taylor and Ian Bennett, Intervenors
DOCKET NO. 2014-0211-PocED (7/23/2015)

PRIMARY ISSUES: Whether Respondent could increase the number of days employees would be employed, from 240 days as was stated in the posting to 261 days, less than a month after the positions were filled.

SUMMARY: Grievant applied for two positions posted as 240-day positions. He interviewed for the positions, and would have been the successful applicant for one of them. During the interview he asked the Superintendent about the possibility of either position being made a 261-day position, and was told that would not happen. Based on the posting and this confirmation, Grievant withdrew his applications. Less than a month after Respondent filled the two posted positions, it changed the contracts to 261-day contracts, at which time this grievance was filed. When a board of education posts a position as a 240-day position for the school year, places a person in that position for the school year, and then three weeks later changes the contract to a 261-day contract, the change in the contract term is so close in time to the posting and filling of the position that the board has clearly misled the potential applicants for the position, and violated the notice requirements of West Virginia Code Section 18A-4-8b. The grievance was timely filed as Grievant was not working at the time he learned of the events giving rise to the grievance, and Grievant had standing to challenge the misleading posting when Respondent changed the contract terms.

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STATE EMPLOYEES

<u>KEYWORDS:</u>	Employee Performance Appraisals; Disciplinary History; Overly Aggressive; Unable to Perform Essential Duties; Mitigation; Abuse of Discretion
<u>CASE STYLE:</u>	<u>Wheeler, Jr. v. Division of Corrections/Beckley Correctional Center</u> DOCKET NO. 2015-0322-MAPS (7/10/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent has established good cause for the termination of Grievant's employment when Grievant is unable to perform the essential duties and responsibilities of his position.
<u>SUMMARY:</u>	Grievant protests his termination from employment with the West Virginia Division of Corrections. Grievant's work performance and personal history indicates substantial performance issues. Grievant was terminated from employment after an evaluation was ordered and it was determined that it was not safe for Grievant to be around inmates, and that he was unfit for duty. Grievant's aggressive behavior was non-professional, inappropriate and created dangerous situation(s). Evidence of record demonstrates that Grievant was assessed for fitness for duty and determined unable to carry out the duties of his position in a safe or appropriate manner. Further, it was opined and found to be highly unlikely that Grievant could or would extensively improve his performance. Respondent identified and established good cause involving performance deficiencies affecting substantial public interests for the action taken. Respondent's actions are not found to be an abuse of discretion. The grievance is DENIED.

<u>KEYWORDS:</u>	Termination; Insubordination; Conduct; Prohibited Workplace Harassment; Good Cause; Nondiscriminatory Hostile Workplace Harassment; Unprofessional; Discipline; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>McLernon v. Department of Environmental Protection</u> DOCKET NO. 2015-0781-DEP (7/2/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved by a preponderance of the evidence that it had good cause to terminate Grievant's employment.
<u>SUMMARY:</u>	<p>Grievant was employed by Respondent as an Environmental Analyst. In May 2014, Grievant was suspended for inappropriate, insubordinate conduct toward his supervisor. At that time, Grievant was warned that further conduct would result in his dismissal from employment. In January 2015, Grievant admittedly used profanity toward his supervisor and conveyed to her that he did not care about her opinion regarding whether he could attend a permitting meeting on work time. Respondent charged Grievant with insubordination and violation of the Division of Personnel's Prohibited Workplace Harassment policy for his conduct toward his supervisor, and alleged other improper conduct toward another staff member, and dismissed him from employment. While Grievant admitted to using profanity toward his supervisor and stating that he did not care about her opinion, Grievant denied the charges of insubordination and denied engaging in improper conduct toward the secretary. Further, Grievant asserts that there was no good cause for his dismissal. Respondent proved by a preponderance of the evidence that Grievant engaged in acts of insubordination toward his supervisor and that such constituted good cause for his dismissal. However, Respondent failed to prove by a preponderance of the evidence that Grievant engaged in improper conduct toward the secretary and that Grievant violated the Prohibited Workplace Harassment Policy. Therefore, the grievance is DENIED.</p>

<u>KEYWORDS:</u>	Dismissed; Jurisdiction; Pay Increase; Circuit Court Order; Pay Grade; Hartley
<u>CASE STYLE:</u>	<u>Workman, et al. v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital</u> DOCKET NO. 2015-0887-CONS (7/7/2015)
<u>PRIMARY ISSUES:</u>	Whether the Grievance Board lacks jurisdiction to hear this grievance.
<u>SUMMARY:</u>	Grievants are employed as Health Service Workers by Respondent at Mildred Mitchell-Bateman Hospital. Grievants challenge their rate of pay which was implemented as a result of a Circuit Court order and/or West Virginia Code § 5-5-4a, and appear to seek compliance with the Circuit Court order. The Grievance Board lacks jurisdiction to enforce a Circuit Court order. Further, West Virginia Code § 5-5-4a specifically exempts pay increases granted pursuant thereto from the grievance process. Therefore, Respondent DHHR's Motion to Dismiss should be granted, and this grievance, DISMISSED.
<u>KEYWORDS:</u>	Termination; Rational Nexus; Federal Criminal Misdemeanor Charges; Guilty Plea
<u>CASE STYLE:</u>	<u>Huff, Jr. v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2015-0843-DHHR (7/20/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved by a preponderance of the evidence that it was justified in terminating Grievant's employment.
<u>SUMMARY:</u>	Grievant was previously employed by Respondent as a Child Protective Services Worker. Grievant was dismissed from employment after a year of service when Respondent discovered that Grievant had previously been convicted of two federal criminal misdemeanor charges of deprivation of another's constitutional rights for coercing a probationer under his supervision into having sex with him in exchange for his recommendation that she remain on probation despite a positive urinalysis and a DUI charge. There is a rational nexus between Grievant's crime and his position in that Grievant abused authority of the same type that he had in his position with Respondent. Respondent proved by a preponderance of the evidence that it was justified in terminating Grievant. Accordingly, the grievance is denied.

KEYWORDS: Termination; Adult Protective Services Report; Hearsay Allegations; Exculpatory Evidence

CASE STYLE: Large v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2015-0721-DHHR (7/21/2015)

PRIMARY ISSUES: Whether Respondent proved that it had good cause to terminate Grievant's employment.

SUMMARY: Grievant was dismissed from his employment as a Health Service Worker at the William R. Sharpe, Jr. Hospital. This action by Respondent was based upon allegations that Grievant engaged in exploitation of a former patient. Respondent attempted to meet its burden to establish the charges by offering testimony at level three that was unpersuasive, and by offering reports that contained both uncorroborated hearsay and some exculpatory evidence. Oddly enough, Respondent also argued that the Grievant's termination should be upheld in view of what they characterized as evasive and inconsistent responses by the Grievant, as well as the failure of Grievant to fully accept that his actions were improper. Respondent did not meet its burden of proof in this grievance based upon the record offered in support of Grievant's termination.

KEYWORDS: Termination; Signing a Statement Prepared for or by an Inmate; False Testimony; Credibility; Mitigation

CASE STYLE: Sites v. Division of Corrections/Huttonsville Correctional Center
DOCKET NO. 2015-0710-MAPS (7/29/2015)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's employment.

SUMMARY: Grievant was dismissed from his employment by Respondent when he signed a statement written by or on behalf of an inmate for the inmate's disciplinary appeal, and the statement contradicted his testimony at the inmate's disciplinary hearing. Respondent proved the charges against Grievant, and that his credibility had been compromised. Grievant did not demonstrate that the penalty imposed was clearly excessive, or different from that imposed on other employees for the same offense.

KEYWORDS: Selection Process; Most Qualified Applicant; Interview; Discrimination; Favoritism; Supervisory Position; Arbitrary and Capricious

CASE STYLE: Young v. Division of Highways
DOCKET NO. 2014-1704-DOT (7/31/2015)

PRIMARY ISSUES: Whether Grievant established that his non-selection was unlawful, unreasonable, or arbitrary and capricious.

SUMMARY: Grievant applied for a Maintenance Engineer position posted by Respondent and was not the chosen candidate. Grievant failed to demonstrate that his non-selection was the product of unlawful, unreasonable, or arbitrary and capricious behavior. Grievant failed to demonstrate that he was the overall best candidate for the position. Respondent articulated a rational explanation for not selecting Grievant for the position. The successful candidate was qualified and Respondent presented a rational basis for the determination it reached for the selection of the successful applicant. The decision to not offer Grievant the supervisory position of Maintenance Engineer was not arbitrary and capricious. This grievance is DENIED.

KEYWORDS: Probationary Employee; Dismissal; Misconduct; Insubordination; Performance; Abusive Language; Arbitrary and Capricious

CASE STYLE: Doughty v. Department of Veterans Assistance
DOCKET NO. 2015-0865-DVA (7/21/2015)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant engaged in insubordinate conduct, and that his dismissal was justified.

SUMMARY: Grievant was employed by Respondent as a groundskeeper. Grievant was dismissed from employment within his six-month probationary period following altercations with his supervisor and the Cemetery Administrator. However, in the dismissal letter, the Cemetery Administrator cited both performance issues, as well as misconduct, including insubordination, as the reason for Grievant's dismissal. Grievant denies Respondent's claims. As Respondent's allegations of insubordination and misconduct were significant factors in the decision to dismiss Grievant, the undersigned concludes that the dismissal was for misconduct, rather than performance; therefore, Respondent bears the burden of proof in this grievance. Respondent proved by a preponderance of the evidence that Grievant engaged in insubordinate conduct toward his supervisor and the Cemetery Administrator, and that Grievant's dismissal was warranted. Therefore, the grievance is DENIED.

KEYWORDS: Probationary Employee; Attendance Issue; Burden of Proof; Unsatisfactory Work Performance

CASE STYLE: Lester v. Division of Highways
DOCKET NO. 2015-0872-DOT (7/14/2015)

PRIMARY ISSUES: Whether Grievant demonstrated by a preponderance of the evidence that his services for Respondent were satisfactory.

SUMMARY: Grievant was dismissed from his employment by Respondent for unsatisfactory performance at the end of his initial six-month probationary period. The primary concern regarding Grievant's performance involved his unsatisfactory pattern of attendance based upon taking 32 of 40 hours of accrued annual leave and 37 of 48 hours of earned sick leave during the six-month probationary employment period, rather than any violation of the employer's established leave policies. Because the Division of Personnel's Administrative Rule establishes a low threshold for terminating a probationary employee, Grievant was unable to demonstrate that his attendance was sufficiently satisfactory to overturn the termination of his probationary employment.

KEYWORDS: Suspension; Inmate Count; Standing Count; Lack of Documentation; Security Procedures; Progressive Discipline; Mitigation.

CASE STYLE: Evans v. Division of Corrections/Beckley Correctional Center
DOCKET NO. 2015-0784-MAPS (7/8/2015)

PRIMARY ISSUES: Whether the discipline of Grievant was justified for incorrectly counting inmates and whether Grievant proved that a three-day suspension was unwarranted under the circumstances.

SUMMARY: Respondent suspended Grievant for failing to follow established policies and procedures for conducting inmate counts at the Center on two days in late October. This action resulted in erroneous inmate counts being recorded. Grievant does not dispute that the counts were inaccurate, but argues that the punishment given to him was more severe than that given to other officers involved in the incident. Respondent proved that the punishment given to Grievant was consistent with progressive discipline and was not disproportionate to the alleged misconduct.

KEYWORDS:

Policies; Reasonable Suspicion; Alcohol Testing; Drug-and-Alcohol-Free Policy; Consent Form

CASE STYLE:

Bias v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital

DOCKET NO. 2015-0888-DHHR (7/7/2015)

PRIMARY ISSUES:

Whether Respondent proved it had good cause to terminate Grievant.

SUMMARY:

Grievant was terminated from her position as a Nurse 3, Nurse Educator, for violation of the Division of Personnel's and Respondent's policies relating to alcohol when she tested positive for alcohol through breath alcohol testing. Grievant asserts that she smelled of alcohol and tested positive for alcohol due to her gastric bypass and overconsumption of breath mints. Respondent failed to prove it had good cause to terminate Grievant when there was no evidence Grievant was impaired, Respondent did not follow its policy in conducting alcohol testing, Respondent did not allow Grievant to challenge the test, and the only other evidence of alcohol use was testimony of witnesses that Grievant smelled of alcohol. Accordingly, the grievance is granted.